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No. 10-337

Supreme Court, U.S.
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IN THE

Supreme Court of the United States

FAYUS ENTERPRISES, on behalf of itself and all others similarly situated, et al.,

Petitioners,

–v.–

BNSF RAILWAY COMPANY, et al.,

Respondents.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

PETITIONER'S REPLY IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

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PETITIONER'S REPLY IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

SUMMARY

Three points raised by Respondents in their Opposition to Petition for Certiorari warrant a Reply.

A. This is not a Rate-Making Proceeding

Respondents argue that Petitioners are objecting to the fairness of their shipping rates and practices, to bring the case within the traditional Interstate Commerce Act preemption. What the complaint challenges, however, are agreements in restraint of trade. The "remedies provided under Federal or State law" that are preempted under 49 U.S.C. § 10501(b)) (second sentence) are only remedies "with respect to regulation of rail transportation." *Id.* Laws barring agreements in restraint of trade, whether Federal or State, do not "regulate rail transportation."

B. Respondents Paper Over the Circuit Conflict

Respondents argue that the conflict described in the Petition is not genuine because all circuits agree that state laws regulating rail transportation are expressly preempted. Opposition at 12. The argument begs the question, which is: What constitutes regulation of rail transportation. As demonstrated in *Respondents'* cases, most circuits follow the test that the challenged law must purport to manage or govern. Applying its own purposes and

objectives analysis, the Court of Appeals here applied an economic impact test and found statutes of general application prohibiting agreements in restraint of trade to be regulation of rail transportation. This analysis both departs from the express preemption language and ignores the specific U.S. Government policy enacted with the statute. It is in direct conflict with a 2010 Fifth Circuit *en banc* decision, to which the Court of Appeals turned a blind eye.

C. Respondents Do Not Analyze the Preemption Statute

The operative preemptive language here, the Exclusive Remedies clause Congress added to the statute in 1995, was tacked on to a section dealing with the STB's exclusive jurisdiction. In the final bill Congress added an additional limiting phrase to this new preemption clause, expressly clarifying that preemption was only for "remedies with respect to regulation of rail transportation" (App. 62a, 49 U.S.C. § 10501(b), second sentence). Respondents argue that Congress's preemptive intent should be gleaned from legislative reports, but they rely principally on two reports written before this limiting phrase was added. Only one legislative report comments on this added sentence, and both Respondents and the Court of Appeals ignore the comment. In any event, the Court should take this opportunity to emphasize the primacy of statutory language in determining Congress's preemptive intent.

ARGUMENT

A. The Petition Does Not Request Review of a Rate-Making Proceeding

This is not a rate-making case. Respondents' mantra that this case involves "rates and practices," instead of a conspiracy and agreements in restraint of trade as alleged in the Complaint, enables them to cite repeatedly to the Exclusive Jurisdiction clause, which provides the Surface Transportation Board with exclusive jurisdiction over rates and services. App. 64a, 49 U.S.C. § 10501(b)(1). Having established a straw man pleading, Respondents then confuse the cases cited under the Exclusive Jurisdiction clause with cases decided under the Exclusive Remedies clause – the only place where the word "preemption" appears.

On this appeal from a motion to dismiss the starting point is the Complaint. It alleges that Respondents (i) "entered into and effectuated a contract, combination or conspiracy in unreasonable restraint of trade" in violation of the Sherman Act (App. 128a-129a, Cplt. Count I), (ii) "entered into agreements in restraint of trade in violation of" various state antitrust laws (App. 129a-32a, Cplt. ¶¶ 122-42), and (iii) by these conspiracies and agreements in restraint of trade engaged in "unfair competition or unfair, unconscionable, deceptive or fraudulent acts or practices" in violation of state consumer protection and unfair competition statutes and unjust enrichment laws (App. 132a-36a, Cplt. Counts III & IV).

Respondents also acted collectively to manipulate a trade organization that they dominated (App. 101a, Cplt. ¶ 72), and acted in collusion and met regularly to agree upon and coordinate implementation of surcharges that they agreed to add on to rail freight shipping rates (App. 75a-77a, 97a-98a, Cplt. ¶¶ 10-17 & 64-65). Respondents moved in lockstep in furtherance of their price-fixing conspiracy (App. 71a-72a, 98a, Cplt. ¶¶ 2, 65). Respondents' conspiracy in restraint of trade enabled them to impose on plaintiffs what was represented as a fuel surcharge, but in fact was a percentage increase based "on the entire cost of rail freight transport," which was "far beyond any actual increases in fuel costs" (App. 101a-02a & 105a, Cplt. ¶¶ 73 & 81). Respondents engaged in concerted action through anticompetitive agreements to increase profits and to avoid undercutting each other. (App. 103a-106a, Cplt. ¶¶ 77-81.)

In their Opposition to the Petition, Respondents contend that what they achieved by these unlawful agreements in restraint of trade are protected "rates and practices," and repeatedly characterize Petitioners' complaint as challenging these "rates and practices." *E.g.*, Opposition at 3, 5, 10, 11, 12, 15 & 18. Respondents' unlawful contracts and agreements in restraint of trade were in violation of Federal and State law (App. 128a-36a, Counts I-IV), and were contrary to the explicit pro-competition statutory policy enacted by the ICC Termination Act (App. 62a, 49 U.S.C. § 10101 (1) & (4)).

B. The Court of Appeals' Expansive View of Regulation Conflicts with Other Circuits

Respondents state with conviction: "*All* of the circuit courts that have addressed the issue agree that if a state law has the effect of regulating rail transportation, it is expressly preempted by Section 10501(b)." Opposition at 12 (original emphasis). As the cases string-cited afterwards indicate, in the context of this case the statement is both true and meaningless.

"Transportation" is a term defined at 49 U.S.C. § 10102(9) to cover equipment and facilities "related to the movement of passengers and property" and "services related to that movement." (Respondents purport to find the definition in the Exclusive Jurisdiction clause, 49 U.S.C. § 10501(b) (first sentence), but the term "transportation" is used there, not defined there. Opposition at 21.) "Regulation" is not defined in the statute, but the cases (including those cited by Respondents) equate the term with "managing or governing" transportation by rail. The question is whether laws prohibiting agreements in restraint of trade regulate rail transportation, even though such laws have no effect on managing or governing railroads.

Where the Court of Appeals differs from other circuits is in deciding that regulation essentially means economic impact. Opposition at 10; App. 16a-18a (Opinion below). The Court of Appeals said yes. The Third Circuit, following the statutory language instead of legislative reports, has taken a directly opposite approach:

> Contrary to New Jersey and the *amici's* argument, the Termination Act does not preempt only explicit economic regulation. Rather, it preempts all state laws that may reasonably be said to have the effect of managing or governing rail transportation . . . . What matters is the degree to which the challenged regulation burdens rail transportation, not whether it is styled as "economic" or "environmental."

New York Susquehanna & W. Ry. v. Jackson, 500 F.3d 238, 252, citing *Fla. E. Coast Ry. v. City of W. Palm Beach*, 266 F.3d 1324, 1331 (11th Cir. 2001).

Respondents and the Court of Appeals base their approach on two legislative reports containing oblique references to economic regulation. Opposition 6-7. The Senate Report quoted, however, did not address the Exclusive Remedies clause at all,[1] and the House Report addressed the Exclusive Remedies clause before the limiting phrase "with respect to regulation of rail transportation" was added to it.[2] See Petition at 18-20. The only guidance in the legislative reports on the meaning of this limiting phrase is in the Conference Committee Report. The Report states that the sentence was added to "clarify[] that the exclusivity is limited to remedies with

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[1] Report of the Senate Commerce Committee, Interstate Commerce Commission Sunset Act of 1995, S. Rep. 104-176 at 57, Nov. 21, 1995, commenting on bill S.1096 § 304 (1995).

[2] Committee on Transportation and Infrastructure, House of Representatives, ICC Termination Act of 1995, H.R. Rep. 104-311 (Nov 6, 1995) *reprinted in* 1995 U.S.C.C.A.N. 793.

respect to rail regulation – not State and Federal law generally."[3]

Other circuits have concluded that regulation of rail transportation is more strictly related to managing or governing rail operations. The nine cases string-cited by Respondents illustrate. Four of them found no preemption because there was no managing or governing rail operations:

- *Franks Invsmt. Co. v. Union Pac. R. Co.*, 593 F.3d 404, 410-11 (5th Cir. *en banc*, 2010) ("only laws that have the effect of managing or governing rail transportation will be expressly preempted" – challenge to closing of private crossing only incidentally affects, and does not have "the effect of managing or governing," rail transportation);
- *Adrian & Blissfield R. Co. v. City of Blissfield*, 550 F.3d 533, 539-41 (6th Cir. 2008) (state law permitting municipality to construct a sidewalk at a railroad crossing (when railroad refused to do so) and bill the railroad for the cost not preempted; state regulation that is "not unreasonably burdensome" and "does not discriminate against railroads" is not preempted);
- *Emerson v. Kansas City S. Ry.*, 503 F.3d 1126, 1131-32 (10th Cir. 2007) (local regulation of improper dumping of railroad ties not

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[3] House-Senate Committee of Conference, ICC Termination Act of 1995, H.R. Rep. 104-422 at 167 (Dec. 18, 1995), *reprinted in* 1995 U.S.C.C.A.N. 850. ("Conf. Comm. Rpt.")

preempted – railroad's logic rejected as it would permit railroad to "dispose of a dilapidated engine in the middle of Main Street").

- *Fla. E. Coast Ry. v. City of W. Palm Beach*, 266 F.3d 1324, 1331 (11th Cir. 2001) (the landmark case – regulation of property leased by railroad is not managing or governing railroad operations).

Of the five cases that did find preemption, four dealt with transloading facilities or a right of way needed for loading and unloading freight, and the fifth found preempted a challenge to an STB-approved reconstruction of a rail line.

- *Norfolk S. Ry. Co. v. City of Alexandria*, 608 F.3d 150, 157-58 (4th Cir. 2010) (preemption provision narrowly tailored to displace only "regulation," *i.e.*, those state laws that may reasonably be said to have the effect of managing or governing rail transportation – local regulation of movement and transloading of freight preempted).
- *New York Susquehanna*, 500 F.3d at 252 (preemption reaches local rules that would manage or govern railroad operations; regulation of transloading facility preempted).
- *City of Lincoln v. STB*, 414 F.3d 858, *860*-61 (8th Cir. 2005) (condemnation of a 20-foot strip from railroad right of way preempted because it would interfere with loading, unloading and storage of freight and access for maintenance and derailment response).

- *Green Mtn. R. v. Vermont*, 404 F.3d 638 (2d Cir. 2005) (local regulation of transloading facility preempted.)
- *City of Auburn v. United States*, 154 F.3d 1025, 1030-31 (9th Cir. 1998) (local regulation of a railroad's STB-approved effort to revive a rail line was preempted under Exclusive Jurisdiction clause).

As is readily apparent from the authorities Respondents cited, the Court of Appeals is the only court to have found that laws prohibiting agreements in restraint of trade have the effect of managing or governing railroad operations. In fact, one of Respondents, in seeking a finding of *non*-preemption, won a decision from the Second Circuit holding that

> the ICCTA's pre-emption language . . . does not categorically sweep up all state regulation that touches upon railroads – interference with rail transportation must always be demonstrated.

Island Park, LLC v. CSX Transp. & Consol. Rail, 559 F. 3d 96, 104 (2d Cir. 2009) (state transportation department closure of railroad crossing, sought by Respondent CSX, held not preempted). Respondents have simply made no credible argument that laws prohibiting agreements in restraint of trade interfere with rail transportation.

The task of determining the scope of preemption "must in the first instance focus on the plain wording of the clause . . . ." *CSX Transp. v. Easterwood*, 507 U.S. 658, 664 (1993). Respondents' and the Court of Appeals' confused reading of the statute, reflecting a

misapplied "purposes and objectives" jurisprudence, essentially concludes that preemption "somehow breathes from the pores of the act, although it seems to be contradicted in every way by the words in detail." *See Northern Securities Co. v. United States*, 193 U.S. 197, 407 (Holmes, J. dissenting).

Furthermore, Respondents' contention that no presumption against preemption lies when a state legislates in an area where there has been significant federal presence is misplaced. Opposition at 22. Rather, the presumption analysis starts with the "assumption that the historic police powers of the States [are] not to be superseded by the Federal Act unless that was the clear and manifest purpose of Congress." *Medtronic v. Lohr*, 518 U.S. 470, 485 (1996) (quoting *Rice v. Santa Fe Elevator Corp.*, 331 U.S. 218, 230 (1947)). Moreover, "respect for the States as 'independent sovereigns in our federal system' leads us to assume that 'Congress does not cavalierly pre-empt state-law causes of action.' The presumption thus accounts for the historic presence of state law but does not rely on the absence of federal regulation." *Wyeth v. Levine*, 129 S.Ct. 1187, 1196 n.3 (quoting *Medtronic*, 518 U.S. at 485 (2009)).

The Court of Appeals casually disregarded the ICCTA's preemption language and presupposed that laws prohibiting agreements in restraint of trade fit neatly into the meaning of "regulation of rail transportation." App. 16-17a. This is incorrect. Rather, laws that prohibit agreements in restraint of trade are laws of general application not directed only at railroads. Because these laws have no regulatory effect on rail transportation, they do not encroach on

any federal stronghold or defeat Congress's purpose of regulating rail transportation. Thus, the presumption against preemption should have been applied to account for the historic presence of state laws prohibiting price-fixing agreements that do no supersede any federal mandate.

Certiorari is warranted here to emphasize for lower courts the importance of adhering to the statutory language in construing the scope of an express preemption clause.

C. The Purposes and Objectives Preemption Found Here is Not Supported by the Statute

The issue presented by this Petition is not whether Congress is entrusted by the Constitution with the power to preempt the state laws at issue here, but whether Congress has exercised that power.

The starting point is the statute, quoted in full at App. 64a and not repeated here. It consists of two sentences. The first defines as exclusive the jurisdiction of the Surface Transportation Board (the "STB") over three limited areas: (i) transportation by rail carriers, (ii) the remedies provided by the statute with respect to rates, rules and practices of rail carriers, and (iii) track construction and abandonment (the "Exclusive Jurisdiction clause"). This section was found at 49 U.S.C. § 10501(d) prior to 1995, applying then to the ICC. The second sentence (the "Exclusive Remedies clause") defines "the remedies provided under this part with respect to regulation of rail transportation" as exclusive and states that they

"preempt the remedies provided under Federal and State law." 49 U.S.C. § 10501(b) (second sentence). This clause, which contains the only reference to preemption, was added to the Exclusive Jurisdiction clause in 1995 – the evolution is described on pp. 17-21 of the Petition. In the last draft of the bill that became the ICC Termination Act, Congress added the limiting phrase "with respect to regulation of rail transportation," which the Conference Report explained was to "clarify[] that the exclusivity is limited to remedies with respect to rail regulation – not State and Federal law generally." Conf. Comm. Rpt. at 167; see nn. 1-3 above and accompanying text.[4]

In an effort to obfuscate these two distinct provisions, Respondents quote the statute interspersed with several ellipses and omit (without ellipsis) the word "otherwise" from the Exclusive Remedies clause. However, even the Court of Appeals accepted Petitioners' jurisdiction and remedies characterization of the two sentences and addressed them separately (*e.g.*, App. 5a & 15a), as did the Fifth Circuit *en banc* in *Franks Invsmt. Co. v. Union Pac. R.*, 593 F.3d 404, 406-07 (5th Cir. 2010).

Respondents' obfuscation of the statute engenders a casual approach to statutory construction. To the extent that "preemption" existed before enactment of the ICC Termination Act in 1995, it was a

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[4] Respondents quoted the immediately preceding sentence (Opposition at 5-6, n. 1), and the Court of Appeals quoted the immediately following sentence (App. 18a), but both were silent on this sentence "clarifying" the scope of preemption.

function of the ICC's exclusive jurisdiction over the three areas delimited above, which was continued by the Termination Act for the STB. This is the clause that would prohibit states from conducting rate-making proceedings, the concept addressed in *Texas & Pac. Ry. v. Abilene Cotton Oil Co.*, 204 U.S. 426 (1907), and its progeny (Opposition at 2). As the Court recognized in *Chicago & N.W. Transp. Co. v. Kalo Brick & Tile Co.*, 450 U.S. 311, 319 (1981) (Opposition at 2), it is statutory recognition of Congress's Commerce Clause power, which likely explains why the clause does not speak of preemption, a Supremacy Clause concept.

When the Exclusive Remedies clause added the term "preemption" to the statute in 1995, it was only to preempt remedies provided under Federal and State law with respect to "regulation of rail transportation." Petition at 20. That laws prohibiting agreements in restraint of trade fall outside the preempted regulatory remedies is illustrated by the policy of the U.S. Government enacted by the Termination Act. App. 62a, 49 U.S.C. § 10101 (1) & (4). Neither the Court of Appeals nor Respondents have established a statutory basis for preemption of such collusive and anti-competitive agreements, or a reason to read the statute in a way that conflicts with the statutory declaration of policy.

CONCLUSION

The petition for a writ of certiorari should be granted.

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